Agreement because Kallop wrote that "the indisputable equity of this situation is that we are supposed to be equal business partners." He testified that he continued to believe that Kallop had transferred his extra share to MT & T in 1979. He said that he tried to explain this to Tony, but Tony would not listen to him. Brian contends that he never took any action to ensure that Kallop had transferred the extra share because of his reliance on the 1979 Letter Agreement.

In June of 1984, James Keaney, an associate from Olwine, Connelly, drafted another amendment to the Stockholders Agreement. This draft amendment revoked the June 1983 Amendment that had expanded the board of directors. It also required "WMK" to contribute one share of stock to MT & T. Brian testified that he did not direct Keaney to draft the provision requiring Kallop to contribute one share to MT & T. He contends that he was unaware of Keaney's actions. This draft amendment was never executed.

Tony never resolved his disagreements with Kallop and Brian. During the period that he was feuding with Kallop and Brian his health was failing. His illness became severe enough that it prevented him from carrying out his duties for the company. In June of 1984, Brian called a directors meeting for MT & T. Kallop, Chan and Brian voted to remove Tony from any officership position he held. They elected Brian President of MT & T.

In the summer of 1984, MT & T negotiated with Tony over reducing Tony's role in the company. Keaney sent another draft amendment to the 1974 Stockholders Agreement to Brian. The draft agreement provides that MT & T would repurchase 15% of Tony's stock and reduce his annual salary by 20%. In addition to redeeming Tony's stock, the draft agreement provides that "WK will transfer to the Company one share owned by him." The stockholders never adopted this draft amendment.

The negotiations with Tony changed from reducing his role in the company to repurchasing his entire interest. By April, 1985, MT & T committed to redeeming Tony. The company lacked the funds to repurchase his shares outright in 1985, so Tony's 99 share certificate was placed in escrow and the company promised to pay him over a series of years. Those payments have yet to be completed. Tony's 99 shares still remain on MT & T's stock record.

As a result of Tony's redemption, the 1974 Stockholders Agreement expired. The stockholders had repealed the June 1983 Amendment prior to its expiration in January, 1985, but they had agreed to keep Chan on the board. In 1986, Keaney drafted a new stockholders
agreement to govern the relationship between Kallop and Brian. The first paragraph of the proposed stockholder agreement states:

William Kallop will promptly hereafter will [sic] contribute to the Company one share of capital stock of the Company which is registered in his name, and the Company and William Kallop will cooperate to register such transfer and to issue a new stock certificate, if necessary, registered in the name of William Kallop.

The proposed stockholders agreement also provides a procedure for resolving deadlocks between the two stockholders.

Keaney sent the proposed stockholders agreement to Brian and Kallop in February of 1986. Kallop rejected the stockholders’ agreement as "too cumbersome." He told Brian that if they failed to get along, a stockholders agreement would not provide a solution. He favored continuing to operate MT & T with a three member board consisting of the two stockholders and Chan. Kallop never stated that he would not sign the agreement because it would have required him to turn in his extra share.

Kallop testified that he had decided to keep his extra share by 1986. After years of struggles with the McAllister family, he believed he needed some insurance against a falling out with Brian. Kallop never discussed this with Brian.

After Kallop rejected the stockholders agreement, Keaney drafted a letter agreement that dealt only with the extra share. He sent a letter agreement for transferring the share to Beverly Reilly, Kallop’s secretary, on April 22, 1986. The letter agreement states:

To confirm our agreement in connection with our stock ownership of MTT, I will promptly contribute to MTT one share of MTT capital stock now issued in my name. If necessary, I will surrender my present MTT stock certificate to MTT so the contribution can be effected, and MTT will then reissue to me a certificate evidencing my remaining shares of stock.

Reilly forwarded this proposed letter agreement to Kallop on April 23, 1986. Kallop never signed it.

Chan testified that Brian approached him in March or April of 1986 to discuss Kallop’s extra share. According to Chan, Brian complained that Kallop had promised to turn in his extra share, but was
refusing to do it. Chan told Brian that he should sue Kallop. Brian responded that "that would be the end of the partnership."

Brian testified that this conversation with Chan never happened. He said he was unaware of Keaney's efforts to get Kallop to turn in his extra share. He ridiculed Keaney as a clueless associate who did not know that the shares were already equal. The only time that Brian grew concerned about Kallop's 100th share was a brief period on the afternoon of April 23, 1986.

On April 23, the same day that Reilly sent the proposed letter agreement to Kallop, Brian went to lunch with two old friends, James McQuilling and Andrew LaStella. At lunch, McQuilling told Brian that Kallop claimed to own a majority of the shares of MT & T. Brian became very upset. After lunch, he went straight to Kallop's office and confronted him about his ownership of an extra share. The parties have very different recollections of the exchange that followed.

According to Brian, Kallop assured him that they were equal business partners. Then, Kallop pulled a copy of the August 1979 Letter Agreement from his desk and handed it to Brian. Brian left Kallop's office with a copy of the agreement. He gave it to his secretary and asked her to make a dozen or so copies.

Kallop disputes handing Brian a copy of the August 1979 Letter Agreement. He does not remember this specific conversation, but he testified that he frequently assured Brian that as long as they continued to run the company through the three member board of directors and treated each other fairly, then stock ownership would never become important.

Brian and Kallop did not focus on the share ownership issue for very long in 1986 because MT & T was once again facing financial ruin. MT & T defaulted on its obligation to Tony in 1986. Tony sued the company, but dropped the lawsuit after MT & T eventually caught up with its payments. Brian later discovered that Kallop borrowed large sums of money from MT & T at the same time that it struggled to meet its obligations to Tony. Brian is very upset about these loans because they jeopardized MT & T's obligations to Tony. Brian has not spoken to his brother since he and Kallop forced Tony out of MT & T in 1985. Brian testified that he felt an obligation to his family to ensure that Tony was repaid. Kallop defended the loans by noting that Brian also has loans outstanding to MT & T. Apparently neither stockholder pays interest on these loans. Kallop testified that the company practice is to recoup these funds when a stockholder redeems his shares.

Although Brian complains about Kallop's actions during the late 1980s in retrospect, at the time he had great respect for Kallop's business
acumen. For the first time in its history, MT & T's management was united behind a single business plan. In the five year period from 1986-1991, Brian and Kallop saved the company from bankruptcy and turned it into a successful enterprise.

MT & T successfully expanded beyond its traditional tugboat operations. By 1990, Kallop was re-evaluating MT & T's heavy investment in the tugboats. He determined that the tugboat operations were chronically losing money and would never be profitable. Kallop wanted to focus MT & T's resources on its oil operations and other profitable projects. Kallop knew that Brian, the President of MT & T and the supervisor of the tugboat operations, was unlikely to support reducing MT & T's role in the tugboat industry. Kallop and Chan met with Brian on October 17, 1991, to discuss these issues. At this informal meeting, Kallop noticed a formal directors meeting for October 22, 1991. MT & T had not had a formal directors meeting since 1984.

Brian feared that Kallop and Chan planned to remove him as an officer of MT & T at the directors meeting. In preparation for the meeting, Brian checked the company's financial statements. He testified that he was surprised to find 199 shares listed in the financial statements instead of 198. He then checked the stock record book and discovered that Kallop still held a certificate for 100 shares.

Brian called Glenn Oxton, corporate counsel for MT & T, to determine whether Kallop could vote the extra share. He showed Oxton the August 1979 Letter Agreement. Oxton told Brian that he did not believe Kallop could vote his 100th share. Brian then sent a letter to Kallop. The letter, dated October 21, 1991, states:

I refer you to your letter to the Company dated August, 1979, in which you transferred one share of the capital stock in the Company held by you to the Company as a capital contribution. Please surrender your share certificate to Mrs. Beverly Reilly forthwith in exchange for a re-issued stock certificate evidencing your ownership of 99 shares in the Company.

In response to Brian's letter, Reilly asked Kallop to return his share certificate. Kallop told her that the certificate was in his summer home in South Hampton. Kallop did not say that he intended to keep his 100th share.

The next day, October 22, 1991, Kallop, Chan and Brian appeared at a formal directors meeting. Brian objected to Chan's presence at the meeting because he refused to accept Chan's status as a director. Kallop
presented his proposal for reorganizing the company’s tugboat operations, but he could not convince Brian to support his plan. Kallop and Brian agreed to table the divisive issues and continue the status quo until they could come to an agreement. A few weeks after the directors meeting, Brian asked Mulvihill to help mediate the dispute between Brian and Kallop.

The directors held a second formal meeting at the end of November, 1991. At the start of the meeting, Brian again objected to Chan’s status as a director. The minutes of the November meeting describe the disagreement between Kallop and Brian:

Mr. McAllister then made the following statement: 'Please be advised that I must object to a board consisting of three members and to Larry Chan as the third director. Bill and I each own 50 percent of the stock of McAllister and consistent with our understanding each of us should be directors on a two member Board.' Mr. Kallop stated that this was not his understanding of the situation as discussed at the last board meeting.

Brian and Kallop could not agree over the minutes of the previous meeting. Brian wanted the minutes to state that he contested Chan’s status as a director on the basis that only he and Kallop, as 50% shareholders of MT & T, are directors of MT & T. Kallop would not accept that version of the minutes. He accepted a version that mentioned Brian’s objection to Chan’s presence at the meeting but eliminated the reference to Brian’s status as a 50% shareholder. Once again, Brian would not agree to Kallop’s plan to reorganize the tugboat operations. They tabled the issue again.

During November and December, 1991, Brian kept pressuring Reilly to act on his October 21, 1991, letter which requested Kallop to turn in his certificate. Reilly passed these requests along to Kallop. In late 1991, Kallop did bring his share certificate to Reilly. Reilly asked him to sign a stock transfer, but he refused. Kallop testified that he returned his certificate to the company safe for safekeeping, but never intended to redeem his extra share. A few weeks later he took it back because he feared Brian might try to destroy it.

Brian continued to pressure Reilly about Kallop’s certificate. After Kallop brought in his certificate, she told Brian that she had begun the process. She made the following notation in the stock book on the stub corresponding to Kallop’s certificate: "Received Certificate No. 8 for 100 shares . . . voided and reissued as cert. 12 for 99 per agreement dated
1986. She says she never cancelled Kallop’s certificate nor did she issue a new certificate number 12. Brian’s lawyers discovered that a certificate was missing from the back of the stock book. Reilly doesn’t recall removing a certificate from the stock book, but says she may have used it for an MT & T subsidiary. Brian asked Reilly about the certificate several times a week during this period. She asked Kallop whether he was going to turn in his share and he responded that he would turn in his certificate when Brian accepted Chan as a director. Reilly gave this message to Brian.

Brian and Kallop kept an uneasy peace until October 1992, when Brian, Kallop and Chan held a directors meeting. At the meeting, Brian again contested Chan’s status as a director. He also refused to accept Kallop’s proposal to change the tugboat operations. Kallop and Chan gave up their effort to persuade Brian. They voted to remove him from his supervisory position of the tugboat operations, replacing him with Kallop. Brian warned them that he would take legal action to prevent the changes.

Brian’s opportunity to assert himself came a couple of months later. In December of 1992, MT & T was refinancing its loans once again. The new lender, ITT Capital Corp, requested that both stockholders sign personal guarantees on the loan. Chan and Brian were present at the closing of the refinancing. Just as his brother Tony had done in 1983, Brian used the personal loan guarantees as leverage to increase his power within the company. He told Chan that he would not sign the loan guarantee unless Chan signed a memorandum agreement that Brian had prepared. Under pressure to secure the financing, Chan accepted the agreement with some minor changes. The memorandum agreement, with the changes made at Chan’s request printed in bold, states in pertinent part:

2. You support the execution of a new stockholders agreement between Bill Kallop and myself which fairly reflects our equal stock ownership, and economic issues between the shareholders
3. You support the expansion of the board on a basis which would reflect our equal stock ownership and in a fair manner to deal with deadlocks.

Kallop was furious when Chan told him about the memorandum agreement. He called Brian and insisted that Brian rescind it.

The next day, December 9, 1992, Kallop, Brian and Chan were to meet for another directors meeting. Prior to the meeting, Brian made an
effort to restore a tentative peace between the stockholders. He sent Kallop a letter outlining a standstill agreement. Kallop rejected the standstill agreement because it required unanimous stockholder approval of any company decision. The directors meeting commenced at the end of the day on December 9 and was continued on December 11. At this meeting, Kallop and Chan removed Brian from his position as President, replacing him with Kallop. They elected Brian as Chairman of the Board of Directors and kept his salary equal to Kallop's salary.

After the events of December, 1992, Reilly concluded that Kallop was not going to turn in his extra share. She went back to the stock book and crossed out her notations.

In early January, 1993, Brian noticed a formal stockholders meeting for January 26 to discuss Kallop’s extra share, the need for a stockholders agreement and to elect directors. Kallop sent a letter to Brian indicating that he would not appear at the meeting. Because there was no quorum at the stockholders meeting, no directors were elected. Kallop nonetheless appeared briefly at the meeting to direct a process server to serve Brian with a summons and complaint filed in the Supreme Court of New York in which Kallop asserted ownership of the 100th share of stock. Brian filed the complaint in this Court in January 28, 1993. This is the forum the parties ask to resolve their dispute.

II. ANALYSIS

The heart of the parties' dispute is the legal effect of the 1979 Letter Agreement. In 1974, the original stockholders undoubtedly never envisioned Kallop ending up in control of MT & T because of the extra share issued to him for tax purposes. But, had Kallop never signed the 1979 Letter Agreement, Brian would have no legal or equitable basis for claiming equality with Kallop. Brian has presented several theories as to how the 1979 Letter Agreement equalizes stock ownership. He contends that Kallop transferred his share to MT & T pursuant to the Letter Agreement. In the alternative, he argues that he can now enforce Kallop’s promise to transfer his share to MT & T. Finally, he requests that the Court estop Kallop from asserting ownership of the 100th share as a result of Brian’s reliance on the Letter Agreement. Kallop responds that the 1979 Letter Agreement was merely a written promise to make a gift. Kallop says he never actually made that gift and, therefore, he still owns 100 shares of MT & T stock.

I will first determine whether the 1979 Letter Agreement was a contract between Kallop and MT & T or a promise to make a gift. Kallop argues that there was no consideration for his promise to give one
share of stock to MT & T. Thus, it was not a contract. Brian cites the language of the Letter Agreement to show that there was consideration. The Letter Agreement states that Kallop believed that transferring his extra share "will be in the best interests of [MT & T] . . . and will contribute to its success and future growth." Brian believes that this is adequate consideration. Brian also asserts that Kallop's promise to transfer his extra share benefitted Kallop because it focused Brian on his work and it reduced the antagonism among the other stockholders.

[1-4] Consideration can consist of either a benefit to the promisor or a detriment to the promisee. Hazzard v. State, Del. Supr., 456 A.2d 796, 797 (1983). A fundamental element of consideration is that the parties bargain for it. Barnard v. State, Del. Super., 642 A.2d 808 (1992), aff'd, Del. Supr., 637 A.2d 829. A party offers consideration to induce a promise from the other party. Id. Kallop's promise to transfer his share was not induced by consideration. Kallop did not make his promise in exchange for a benefit to himself or a detriment to MT & T or any of its stockholders other than Kallop. Brian did not offer to become more cooperative after he turned in his extra share. Brian merely asked Kallop to redeem his extra share and Kallop agreed to do it. Kallop agreed to do it because the stockholders had planned to hold equal ownership interests when they formed the company. Past consideration does not create an enforceable promise. Hayes v. Plantation Steel Co., R.I. Supr., 438 A.2d 1091, 1094 (1982). The Letter Agreement is only a promise to make a gift; it is not a contract.

[5] A promise to make a gift is not legally binding until the gift is completed. A gift becomes legally valid when there is donative intent, delivery, and acceptance. In re Carroll, A.D. 2 Dept., 474 N.Y.S.2d 340, 341 (1984). Brian contends that Kallop completed the transfer of his share to MT & T and, therefore, Kallop owns only 99 shares. Kallop responds that he still owns 100 shares of MT & T stock. He contends that he never transferred his share of stock to MT & T. The parties disagree over whether Kallop took the necessary steps to complete a gift of stock.

A. Requirements of Stock Transfer

[6-9] Stock transfers for Delaware corporations are governed by Article 8 of Delaware's version of the Uniform Commercial Code (the "UCC"). 8 Del. C. § 201; 6 Del. C. § 8-301 et. seq. ("Article 8"). Article 8 establishes two requirements for completing a transfer of a certificated share of stock, indorsement and delivery. 6 Del. C. §§ 8-308, 8-309. Indorsement of a certificate can be accomplished by either signing the
Kallop argues that his share certificate was not transferred pursuant to the requirements of Article 8. He argues that he never indorsed his certificate because he never signed it. He contends that he never delivered his certificate to MT & T because he never relinquished control over it. MT & T never cancelled his certificate and issued him a certificate for 99 shares. MT & T did not record a transfer in its stock book until Reilly made her notations in 1991. Kallop contends those notations, which Reilly later crossed out, were made in error. Kallop argues that these facts demonstrate that he never transferred a share of stock.

Brian argues that the one share was transferred to MT & T. He contends that all the requirements for transfer of the stock were completed in 1991. Kallop brought his certificate to Reilly in response to Brian's October 1991 letter requesting that he turn in his share. Reilly, with the 1979 Letter Agreement in her possession, then made her notations in the stock book. Brian contends that this action satisfied the requirements of indorsement and delivery.

For Kallop to have transferred his share in 1991, he had to satisfy the requirements of indorsement and delivery. 8 Del. C. § 8-309. The 1979 Letter Agreement satisfies the indorsement requirement. The document, which is signed by Kallop, states "I hereby give, transfer and deliver to the Company one share of Common Stock as a contribution to capital." Kallop had only to deliver the stock to make the transfer complete. For the purposes of Article 8, "delivery" is a "voluntary transfer of possession." 6 Del. C. § 1-201(14). Kallop's presentation of his certificate to Reilly in 1991 did not satisfy the delivery requirement. Kallop testified that he was placing his certificate in the company safe, but he was not relinquishing control of his certificate. The circumstances surrounding this event support Kallop's testimony. I cannot infer from Kallop's placement of his certificate in the company safe that he was transferring possession of the certificate to MT & T. MT & T's stockholders had used the company safe to store personal property, including stock certificates, for over a decade. Brian keeps his certificate in the company safe. More importantly, Kallop made it quite clear that
he was not delivering his share to MT & T when he brought his certificate to Reilly. Reilly asked Kallop to sign the certificate or a power of stock transfer so that she could cancel his 100 share certificate. He refused to sign the certificate. Kallop did not have to indorse the certificate to effectuate a transfer because MT & T already had the 1979 Letter Agreement in its safe. Kallop’s refusal to sign his certificate, however, unequivocally shows that he was not delivering his certificate to MT & T in 1991. He maintained control over his certificate despite placing it in the company safe. Three weeks later, he retrieved his certificate because he feared Brian might destroy it. Reilly’s notations in the stock book do not contradict Kallop’s version of the events. Reilly testified that she knew that Kallop had not yet turned in his share when she made these notations, but she wanted to "start the process" to appease Brian. Kallop did not deliver his certificate in 1991.

B. Constructive Delivery

Brian argues that actual delivery of the share certificate was unnecessary because Kallop constructively delivered his share in 1979. Although Article 8 provides explicit requirements for delivery of a share certificate, see 6 Del. C. §§ 8-313, 8-320, Brian contends that a symbolic or constructive delivery of a share is sufficient to transfer title to that share. He insists that Kallop intended to immediately transfer his share when he signed the 1979 Letter Agreement. He notes that Kallop could not have physically transferred the certificate, which was being held by Citibank as collateral for MT & T’s loans, so the Letter Agreement itself served as a constructive delivery. He contends that the language of the Letter Agreement and Kallop’s conduct from 1979 through 1983 demonstrate that Kallop constructively delivered his share to MT & T.

Kallop asserts that constructive delivery only applies in special circumstances, such as jointly held accounts, which are inapplicable in this case. He also flatly denies that he intended to constructively deliver his certificate to MT & T in 1979. When he signed the Letter Agreement, he asserts, he intended to take further steps to complete the transfer. He relies on the Letter Agreement itself to support his testimony. It concludes: "[a]t the request of the company, I shall execute such further documentation, if any, as may be necessary or desirable to fully effectuate such transfer." He further contends that the surrounding circumstances show that constructive delivery was not intended. He notes that nothing prevented MT & T from recording a stock transfer in its stock book in August of 1979, but it did not record a transfer. Kallop emphasizes that MT & T recorded the transfers of the shares of Bruce,
Neill and James in its stock book. He contends that MT & T did not record Tony's transfer because those shares are held in escrow until MT & T completes its payments. Kallop argues that "further documentation" was intended, i.e., delivery and recordation, but never completed. Without delivery, Kallop argues, the Letter Agreement does not constitute a valid gift or a transfer of stock pursuant to Article 8.  

[13-15] To complete the transfer of his 100th share, pursuant to both 6 Del. C. § 8-309 and the common law of gifts, Kallop had to deliver his share certificate to MT & T. Constructive or symbolic delivery can satisfy the common law delivery requirement. In re Carroll, 474 N.Y.S.2d at 342. Constructive delivery can also satisfy the requirement of delivery for stock transfer purposes. Norton v. Digital Applications, Inc., Del. Ch., 305 A.2d 656, 659 (1973) ("Delivery, actual or constructive, is required to complete a transfer of [stock]"). Constructive delivery is permitted when actual transfer of physical possession of a certificate is impractical. Delivery "must be as perfect as the circumstances reasonably permit." In re Szabo's Estate, N.Y. Ct. App., 176 N.E.2d 395, 396 (1961).  

[16] At the time that Kallop intended to give his share to MT & T, physical transfer of the certificate was not a reasonable option. Citibank had to retain possession of the stock certificate to maintain its security interest in the stock. See 6 Del. C. § 8-321. Section 8-313 of Title 6 provides for a method of delivery under these circumstances.  

(1) Transfer of a security . . . to a purchaser occurs only:  

(e) with respect to an identified certificated security to be delivered while still in possession of a third person, . . . at the time that person acknowledges that he holds for the purchaser. 6 Del. C. § 8-313(1)(e).  

Kallop's 100th share was not transferred pursuant to § 8-313(1). Neither Kallop nor MT & T notified Citibank of the transfer. Citibank never acknowledged that it held the certificate for MT & T. Nevertheless, Kallop could have transferred his share by some other means that constitutes constructive delivery under the common law. Johnson v. Dodgen, Iowa Supr., 451 N.W.2d 168, 174 (1990); In re Carroll, 474 N.Y.S.2d at 342; Tanner v. Robinson, Fla. Ct. App., 411 So.2d 240 (1982). Contra Bankwest, N.A. v. Williams, S.D. Supr., 347 N.W.2d 163 (1984) (holding that UCC provisions preclude constructive delivery). Kallop did not have to physically transfer possession of his certificate to satisfy the delivery requirement under the circumstances that existed in
August of 1979, but he had to take some action that unequivocally transferred control of his share to MT & T. See In re Szabo's Estate, 176 N.E.2d at 396.

[17] Constructive delivery requires an unmistakable intention to transfer title without transferring possession of the certificate of the transferee. Corporacion Venezolana de Fomento v. Vintero Sales Corp., 452 F. Supp. 1108, 1117 (S.D.N.Y. 1978). Based on my assessment of the testimony by Kallop and Brian, I believe the evidence clearly demonstrates that Kallop unequivocally intended to transfer title without delivery. The language of the Letter Agreement clearly shows that constructive delivery was intended. It states "I here by give, transfer and deliver to the Company one share of Common Stock as a contribution of capital." The last sentence, which states "I shall execute such further documentation, if any, as may be necessary or desirable to fully effectuate such transfer," does not indicate that further documentation was intended before delivery was complete. This sentence shows that Kallop intended to transfer title immediately, but would take additional steps if they were necessary. Because I do not find it credible, I give no weight to Kallop's testimony that he believed further steps were necessary to complete the transfer of his share. I find the language of the Letter Agreement, the best contemporaneous evidence of Kallop's intent, to be much more persuasive.

[18-19] Nevertheless, Kallop's intent to transfer the share, alone, is insufficient to constitute constructive delivery. In re Szabo's Estate, 176 N.E.2d at 396. The most important requirement of constructive delivery is that "this sort of delivery must proceed to a point of no return." In re Szabo's Estate, 176 N.E.2d at 396. Kallop's only effort to transfer the share was execution of the Letter Agreement. Nothing prevented Kallop or MT & T from noting the transaction in the stock book, but nobody recorded a transfer. MT & T's bylaws require that all transfers of stock be recorded on the corporation's books. The bylaws provide that MT & T deems the person recorded on the corporation's books as the owner of shares of stock to be the owner. These recording requirements protect the corporation in disputes over ownership of stock. See Testa v. Jarvis, Del. Ch., C.A. No. 12847, Allen, C. (Dec. 30, 1993), Mem. Op. at 15. Failure to record a transfer of stock does not affect the validity of a stock transfer between the parties to the transaction. See 6 Del. C. § 8-309 (requiring indorsement and delivery before a transfer becomes valid). Recording the transfer is not a requirement of delivery, but it is an adequate method of symbolic delivery where physical transfer of possession is impractical. See In re Carroll, 474 N.Y.S.2d. at 343. So the crux of the matter comes to this: Can the Letter Agreement alone,
without any record of the transfer in the stock book, suffice as a symbolic delivery?

The acts necessary to constructively deliver stock vary according to the circumstances present when delivery is intended. See In re Szabo's Estate, 176 N.E.2d at 396. In In re Szabo's Estate, the New York Court of Appeals held that a donor's directive to her agent to transfer stock to herself and her son jointly did not constitute constructive delivery of the stock. The donor directed her agent to transfer the certificates at a future date. The donor died before that date arrived. The court concluded that the donor could have changed her mind and revoked the directive to her agent until the transfer was recorded on the corporate records. Therefore, constructive delivery had not occurred. Id. at 396. In slightly different circumstances, a Florida court held that a letter alone sufficed as constructive delivery. Tanner v. Robinson, Fla. Ct. App., 411 So.2d 240 (1982). The Florida court held that a donor's letter directing a brokerage firm to transfer stock from her individually held account to an account she held jointly with her nephew constituted symbolic delivery of the stock. Id. at 242. Like the Florida case, the circumstances in this case did not require recording the transfer in the stock book to push the transaction past "the point of no return." Kallop signed a formally drafted letter that states "I hereby . . . deliver . . ." one share of stock to MT & T. The Letter Agreement states that Kallop agreed to undertake further documentation necessary or desirable to complete the transaction. He clearly contemplated physical delivery of his certificate as soon as he regained possession of it. Brian, an officer of MT & T, signed the letter on behalf of the company. There was no clear evidence of exactly what happened to the Letter Agreement following its execution, but it is clear that Kallop did not retain possession. Either Brian kept it on behalf of MT & T or Kallop placed it with MT & T's other important corporate documents. MT & T has had possession of the Letter Agreement since August of 1979. Because Citibank had possession of the stock certificates, the Letter Agreement was a reasonable substitute for a transfer of physical possession of the certificate. See Johnson v. Dodgen, 451 N.W.2d at 174. Unlike the circumstances in Szabo, Kallop could not have revoked his intention to transfer the share. He provided MT & T with a signed letter in lieu of the actual certificate.

[20-21] The Letter Agreement served as an adequate proxy for transfer of physical possession of the certificate. Under the common law of gifts, delivery serves three important requirements. "First, it makes significance of the act vivid and concrete to the donor. Second, the act of manual transfer is unequivocal to the actual witnesses to the transaction. Finally, the fact of delivery gives the donee the prima facie
evidence of the alleged gift." In re Carroll, 474 N.Y.S.2d at 342. The Letter Agreement served all three of these purposes. Signing a formal agreement, which was countersigned by Brian on behalf of MT & T, made the significance of the act apparent. Placing the signed Letter Agreement that unambiguously purports to "give, transfer and deliver" one share to MT & T in the company safe made the transfer unequivocal and provides evidence of the gift. The simultaneous execution of the Letter Agreement by Kallop and Brian, and MT & T's retention of possession of the Letter Agreement, symbolically satisfied the delivery requirement. See Tanner v. Robinson, 411 So.2d at 242.

I do not find the failure to record the transfer in the stock book significant, even though I recognize the importance in most circumstances of following the formal requirements for stock cancellation or transfer. And I do not believe that Kallop purposefully failed to record the transfer in the stock book. Rather, Kallop and Brian intended to record the transfer immediately, but each person mistakenly relied on the other to take care of it. As Secretary of MT & T, Kallop was officially responsible for recording stock transfers on the corporate books. So Brian believed that Kallop would record the transaction. However, MT & T's attorneys generally handled the corporate record keeping. Brian was the principle contact with Mulvihill, MT & T's legal counsel. Kallop believed Brian would handle the record keeping. As a result of this confusion, MT & T failed to record the transfer in the stock book.

Brian's and Kallop's inadvertent failure to record the transfer is not surprising. The Stockholders Agreement made recording the transfer an unimportant formality. Pursuant to its bylaws, MT & T relies solely on its stock book to determine the owners of its shares. Due to the Stockholders Agreement, however, MT & T never had any reason to refer to its stock book. MT & T did not conduct stockholder votes or issue dividends on a per share basis. The Stockholders Agreement gave each stockholder equal management rights and compensation.

[22] A finding that delivery did not occur because of the failure to record the transfer would be inappropriate and inequitable in these circumstances. Recordation is not a requirement of stock transfer. See 6 Del. C. § 8-309. Recording the transfer can satisfy the requirement of constructive delivery, In re Carroll, 474 N.Y.S.2d 340, and it may even be necessary for a constructive delivery in some circumstances. See In re Szabo's Estate, 176 N.E.2d 395. However, failure to record a transfer in the corporate records does not preclude constructive delivery. See Tanner v. Robinson, 411 So.2d at 240. In the circumstances of this case, the Letter Agreement satisfied the delivery requirement. Kallop surrendered control of his certificate when he gave the signed Letter
Agreement to MT & T. To hold otherwise would contravene the clear expectations the parties had in 1979 and violate, in Kallop's own prescient words, the "indisputable equity" of the situation.

Kallop's retrieval of his certificate in 1983 does not alter my opinion. The transfer of the share was already complete in 1979. Kallop's certificate was returned to MT & T in December of 1979. At that point, MT & T should have cancelled it and issued Kallop a certificate for 99 shares. Kallop testified that he purposefully did not cancel his certificate or update the stock book because he decided not to transfer his share in September of 1979. I do not accept Kallop's testimony. Kallop contends that he realized shortly after signing the Letter Agreement that transferring his share could result in an IRS investigation. Kallop presented an expert witness at trial to demonstrate that this was a reasonable fear. Brian presented an expert witness to rebut Kallop's expert. Based on the expert testimony, I do not believe there was a credible risk of an IRS investigation. But, Kallop, a person with only general knowledge of tax law, could have reasonably feared that transferring the share might cause an IRS investigation. Nevertheless, I do not accept Kallop's testimony that he changed his mind one month after signing the agreement. His actions and his words at the time belie his testimony. He did not share his concerns with any other person. He did not seek an opinion from MT & T's legal advisors. He did not take any overt acts to repudiate the Letter Agreement. He made no effort to track down and destroy Brian's memo referring to a secret understanding among the stockholders in 1974. Kallop's conduct from 1979 until 1983 is entirely consistent with the statement in the Letter Agreement that his 100th share was transferred to MT & T. It was only after Tony became troublesome in 1983 that Kallop reasserted ownership of his 100th share. Kallop's reassertion of ownership had no effect because the share was already transferred in 1979.

MT & T did not cancel Kallop's certificate out of oversight. After the execution of the Letter Agreement, Kallop and Brian forgot about the share certificates and focused on MT & T's immediate problems. In retrospect, the share certificate looms large, but MT & T was struggling to survive when these events occurred. When Citibank returned the share certificates, Reilly placed them in the company safe. Kallop did not assert control over his certificate at this time; he was oblivious of it. Two officers of MT & T should have cancelled Kallop's certificate and issued him a 99 share certificate in December of 1979. I believe that Kallop and Brian, the two persons who knew the transfer had occurred, would have cancelled the certificate and corrected the stock ledger had they been alerted to the problem. But Kallop took advantage of an
opportunity and reasserted control over his certificate in 1983, when he realized the extra share could help him reign in Tony. Kallop’s assertion of control over his certificate four years after he transferred it to MT & T, in my opinion, is unimportant. As of 1983, Kallop owned only 99 shares, although his certificate and the corporate stock book improperly showed that he owned 100 shares. Had Kallop transferred his certificate to a third party after he reasserted control over his certificate, this Court would be faced with a very different problem today. Fortunately, that event did not occur and MT & T’s records can and should be corrected to reflect the equal stock ownership of the parties.

C. Kallop’s Defenses

[23] Kallop asserted that Brian’s breach of contract claim is barred by expiration of the limitations period or laches and the mutual releases. Because I found that the 1979 Letter was a gift, Kallop’s contract defenses are inapplicable. Just before trial Brian amended his complaint to request that Kallop be required to return his certificate to MT & T to have it cancelled and reissued as a 99 share certificate. In his briefs submitted to the Court, Kallop has not argued that this request for relief is barred by laches. Because I do not believe laches should bar Brian’s claims, I will assume that Kallop generally asserted laches as a defense. Even if Brian was first aware of Kallop’s wrongful possession of the certificate when he received Kallop’s January 1984 memorandum, laches should not prevent MT & T from requesting that Kallop return its property. A party asserting laches must demonstrate a detrimental change of position. McGinnes v. Department of Finance, Del. Ch., 377 A.2d 16, 18 (1977). Kallop has not suffered any prejudice by MT & T’s failure to insist that he turn in his certificate. He has not taken any action in reliance on his ownership of the extra share.

[24-25] Kallop also asserts that Brian must accept his ownership of 100 shares on the grounds of waiver and estoppel. Waiver requires a voluntary relinquishment of a known right. Arnold v. Society for Savings Bancorp, Del. Supr., 650 A.2d 127 (1995). Brian never voluntarily accepted Kallop’s ownership of 100 shares. Since Kallop executed the Letter Agreement, Brian has continuously acted as though he and Kallop owned an equal number of shares. To establish estoppel, the party claiming estoppel must show that he reasonably relied on another party’s conduct and suffered a detrimental change of position as a result of that conduct. Wilson v. American Insurance Co., Del. Supr., 209 A.2d 904 (1965). Brian took no actions that Kallop could have justifiably relied upon to conclude that Brian accepted Kallop’s ownership
of 100 shares. Brian portrayed himself as Kallop's "partner." Brian's claim for a declaratory judgment that Kallop owns 99 shares is not barred by waiver or estoppel.

D. Chan's Breach of the December 1992 Memorandum Agreement

Brian argues that Chan breached the Memorandum Agreement that Chan and Brian entered into on December 8, 1992. By the terms of that agreement, Chan agreed to "support the execution of a new stockholders agreement between Bill Kallop and myself which fairly reflects our equal stock ownership and economic issues between the shareholders," and an "expansion of the board on a basis which would reflect our equal stock ownership and in a fair manner to deal with deadlocks." Brian contends that Chan breached this agreement when he continued to serve as a director over Brian's objection. Brian asserts that Chan is responsible for Brian's costs of this litigation as a result of that breach.

Chan responds that Brian's contract claim should be dismissed because 1) it was unsupported by consideration, 2) it was entered into under duress, and 3) it is against public policy by restricting the discretion of a director. Chan further asserts that Brian has failed to show that he was damaged as a result of a breach of the agreement.

Consideration may consist of either a benefit to the promisor or a detriment to the promisee. Hazzard v. State, 456 A.2d at 797. The agreement between Brian and Chan was supported by consideration. Brian agreed to execute the loan guarantee in exchange for Chan's promises contained in the Memorandum Agreement. The execution of the loan guarantee, a detriment to Brian, satisfies the consideration requirement.

[26-28] Chan contends that he accepted the agreement under duress. Economic duress occurs where a party is deprived of his free will as a result of a threat to his business interests. Hanna Systems, Inc. v. Capano Group, Del. Ch., C.A. No. 7408, Walsh, J. (Nov. 29, 1985), Mem. Op. at 6. Economic duress can invalidate an otherwise valid contract. Id. at 7. The threat that creates the duress must be wrongful, but it does not have to be unlawful. Id.

Brian's threat not to sign the loan guarantee was not wrongful. Brian was under no duty to extend his personal credit to the corporation. Brian had done so several times before, but that did not obligate him to continue to personally guarantee MT & T's loans. Brian waited until the last possible moment before he refused to execute the guarantee, but that
does not make his refusal wrongful. The Memorandum Agreement is not invalid because of duress.

[29] Chan argues that the Memorandum Agreement violates public policy because it restricts his discretion as a director. To the extent that a contract, or a portion of a contract, limits a director's exercise of his fiduciary duties, it is unenforceable. See Paramount v. QVC Network, Del. Supr., 637 A.2d 34, 51 (1993). The Memorandum Agreement requires Chan a director of MT & T, to support Brian over Kallop in this dispute between the stockholders. It prevents Chan from making an independent, good faith determination of actions MT & T should take regarding this dispute between the two stockholders. Even if Kallop had owned 100 shares, Brian could have used the Memorandum Agreement to force Chan, a director of MT & T, to treat Kallop unfairly. The Memorandum Agreement is invalid because it restricts Chan's exercise of his fiduciary duties.

E. Breach of Fiduciary Duty

Brian asserts a claim for breach of fiduciary duties against Kallop and Chan. Brian contends that Kallop and Chan conducted themselves inconsistently with their obligations as fiduciaries. Brian claims that Kallop and Chan failed to deal honestly with him. He contends that Kallop misled him into believing that Kallop accepted that Brian and Kallop were equal stockholders. Brian asserts that Chan's signing of the Memorandum Agreement despite Chan's belief that Kallop owned an extra share was another dishonest act inconsistent with his fiduciary duty. Brian alleges that Chan falsely stated that he would not become involved in disagreements between Kallop and Brian. Finally, Brian alleges that Kallop and Chan disregarded a board resolution requiring equal payment of attorneys fees by directing payment of their attorneys fees but not Brian's attorneys fees. Brian requests that Kallop and Chan personally pay his attorneys fees as damages for their breaches of duty.

Kallop and Chan deny that they breached their fiduciary duties to Brian. Kallop contends that his actions qua stockholder do not relate to his fiduciary duties qua director. Kallop further argues that Brian's allegation that he lulled Brian into believing that they were equal stockholders was not proven at trial. Kallop and Chan portray the remainder of Brian's fiduciary duty claims as contract claims dressed as fiduciary duty claims. They note that the Court held that MT & T is responsible for Brian's attorneys fees under the board resolution that provides for equal payment of stockholder attorney fees. Brian's claims against Chan, they argue, are breach of contract claims as well.
Defendants contend that Brian cannot bring these claims as breach of fiduciary duty claims.

[30] Directors and officers owe stockholders fiduciary obligations of care and loyalty. See Smith v. Van Gorkom, Del. Supr., 488 A.2d 858, 872 (1985). Brian contends that Kallop acted in bad faith by misleading Brian about Kallop’s position on share ownership for several years. He argues that Kallop’s deceit resulted in this lawsuit. He requests attorneys fees as damages. I do not consider whether the allegations Brian has made would constitute a breach of fiduciary duty because Brian has failed to demonstrate those allegations at trial.

Kallop did not lull Brian into believing that he and Kallop were equal stockholders. Since 1984, Brian has known that he and Kallop disagreed over the number of shares held by Kallop. In January of 1984, Kallop sent Brian a memo regarding the extra share. The memo stated that he would not turn in his extra share until Tony’s extra representation on the board of directors was rescinded. Brian asserts that he focused on the portion of the memo that emphasized that the stockholders were supposed to be equal. I do not find Brian’s explanation credible. A few months after Brian received this memo, Keaney, the associate at Olwine, Connelly who drafted several documents for MT & T during the 1980s, drafted an agreement for transferring Kallop’s share to MT & T. Despite Brian’s denial of any knowledge of this draft agreement, I find that Keaney drafted this document at Brian’s request. Brian was MT & T’s principle contact with the Olwine firm. Keaney would not have drafted this document without a request from the client. The evidence strongly suggests that Brian requested that Olwine, Connelly secure Kallop’s transfer of the extra share. In 1986, Keaney drafted two other documents that purported to transfer the extra share. Again, I find that Brian was not only aware of these documents, but requested that Olwine, Connelly secure the transfer of Kallop’s extra share.

Furthermore, I rely on Chan’s testimony regarding Brian’s state of mind in the spring of 1986. Based on his character and demeanor, I found Chan to be a credible witness. I also note that his business interests outside of MT & T reduce his reliance on the outcome of this litigation. Chan testified that Brian complained about Kallop’s refusal to turn in the extra share. Chan said he told Brian to sue Kallop. Brian replied that "that would be the end of the partnership."

Brian became directly aware that Kallop was openly representing that he owned an extra share on April 23, 1986. Brian testified that Kallop reassured him by handing him a copy of the Letter Agreement. I do not completely accept Brian’s version of his meeting with Kallop. I find that Kallop did not show Brian a copy of the 1979 Letter
Agreement when Brian confronted him about share ownership. As the testimony at trial made abundantly clear, Kallop and Brian often talked past each other regarding the share ownership issue. Kallop was careful to never bluntly tell Brian that he owned an extra share. He also never stated that he and Brian were equal shareholders. He used a lawyerly explanation that emphasized that the corporation would be run through the board of directors. Kallop’s reassurances to Brian were in carefully worded, deliberately measured terms. Kallop did not want an open confrontation with Brian because MT & T was in a desperate financial condition. Brian was just as eager to accept these carefully worded assurances, although he had nagging doubts about the share ownership. Brian decided to rely on the validity of the Letter Agreement rather than confront Kallop.

Brian’s doubts about the share ownership sprang to life in 1991 when he had the inevitable confrontation with Kallop. Once the validity of the extra share became important, Brian moved rapidly to get the corporate records to reflect that Kallop owned 99 shares. Avoiding a confrontation with Kallop was no longer possible, so Brian played his hand. He sent the Letter Agreement to Glenn Oxton, MT & T’s counsel, to prevent Kallop from using the extra share to control the company. Kallop did not mislead Brian into believing that Kallop considered the shareholdings equal. Both Kallop and Brian were aware of their disagreement but each avoided a confrontation on the issue. Both stockholders were desperate, in a sense, to avoid an explosive issue they knew could destroy their "partnership" and their company. By 1991, they could no longer ignore the issue. The dispute that followed led to this lawsuit. Kallop’s conduct in avoiding a confrontation on this divisive issue between the stockholders does not violate the standards of conduct for a fiduciary.

Brian asserts that Kallop and Chan breached their fiduciary duties by refusing to comply with the board resolution providing for equal payments of attorneys fees. Kallop and Chan had maintained that Brian’s attorneys fees were contingent fees that were not due until the conclusion of this lawsuit. Their contention was incorrect, but it did not constitute a breach of fiduciary duty. On October 11, the Court ruled that MT & T was currently obligated to pay Brian’s attorneys fees. The Court’s October 11 decision gives Brian most of the relief he seeks. MT & T should pay Brian’s attorneys fees until payments to Brian’s attorneys equal the payments to Kallop’s attorneys, provided the board of directors finds that the attorneys fees are reasonable. Then MT & T should make equal payments to the attorneys from both sides. No further payments should be made to Kallop’s attorneys until this is done. Pursuant to its
resolution, the board also must decide whether Brian’s agreement to pay his attorneys a 30% premium is reasonable.

Finally, Brian claims that Chan breached his fiduciary duties to Brian by deceiving Brian. First, he contends that Chan falsely told him that he would not intervene in a dispute between the stockholders. I find that Chan did not make this representation. Second, he claims that Chan’s execution of the Memorandum Agreement was a breach of fiduciary duty. He argues that Chan signed the Memorandum Agreement even though he disagreed with what he was signing.

Chan’s conduct was not a breach of his fiduciary duties; nor did he mislead Brian. Brian knew that Chan supported Kallop, but he sought to force Chan to change his position. If Brian has a claim against Chan, it is a breach of contract claim. As discussed above, the Memorandum Agreement violates public policy because it restricts Chan’s ability to comply with his fiduciary duties to Kallop and MT & T. All of Brian’s claims for breach of fiduciary duties are dismissed.

F. Appointment of a Custodian

[31] Brian requests the appointment of a custodian pursuant to 8 Del. C. Section 226. Kallop has not opposed this request. I will defer ruling on Brian’s request for 60 days to give the parties an opportunity to resolve their differences now that their equal status is clear. No stockholder meeting with a quorum has been held when the stockholders have actually deadlocked on an issue or failed to elect directors. See 8 Del. C. § 226(a)(1). Nor is there a developed record which would enable the Court to determine the duration of a custodian’s appointment or the powers to be conferred upon the custodian. These issues need development before I rule on them. Accordingly, I will defer ruling on Brian’s request for appointment of a custodian for 60 days to give the parties an opportunity to convene a stockholder meeting for the purpose of electing directors and to conduct such other business as may properly be noticed. In the event the stockholders are deadlocked or the meeting fails for lack of a quorum, Brian may renew his request for appointment of a custodian. In that event, the Court will consider the results of the meeting, the identities and qualifications of the proposed custodian(s) and the duration of appointment and powers to be conferred upon the custodian(s).

An Order has been entered consistent with this Memorandum Opinion.
ORDER

For the reasons set forth in the Court's Memorandum Opinion entered in this case on this date it is,

ORDERED that:

(1) Judgment is entered in favor of Plaintiff Brian A. McAllister as to his claim that the 1979 Letter Agreement operated as a valid transfer of one share of stock from Defendant William M. Kallop to McAllister Towing and Transportation Company, Inc. (Amended Complaint Count I) leaving Defendant William M. Kallop as the owner of 99 shares of the stock of McAllister Towing and Transportation Company, Inc.;

(2) Judgment is entered in favor of Defendant William M. Kallop with respect to Plaintiff's claim that Defendant William M. Kallop breached contractual rights of Plaintiff created by the terms of the 1979 Letter Agreement (Amended Complaint Count II);

(3) Defendants shall take all necessary steps to cause the books and records of McAllister Towing and Transportation Company, Inc., to reflect that Defendant William M. Kallop owns 99 shares of stock and Defendant William M. Kallop, shall surrender Stock Certificate No. 8 for cancellation and shall be issued a new certificate for 99 shares;

(4) Judgment is entered against Plaintiff and in favor of Defendant Lawrence Chan with respect to Plaintiff's claim that Defendant Chan breached contractual obligations to Plaintiff (Amended Complaint Count III);

(5) Judgment is entered against Plaintiff and in favor of Defendants William M. Kallop and Lawrence Chan as to Plaintiff's claim that Defendants William M. Kallop and Lawrence Chan violated their fiduciary duties to Plaintiff (Amended Complaint Count IV);

(6) Judgment is deferred with respect to Plaintiff's request for appointment of a custodian pursuant to 8 Del. C. §226 (Amended Complaint Count VI) for period of 60 days and until application by Plaintiff, if any;

(7) Judgment is entered in favor of Plaintiff and against Defendant William M. Kallop as to Defendant William M. Kallop's counterclaim for monetary damages arising from Plaintiff's alleged breach of fiduciary duties to Defendant Kallop;

(8) All requests for attorney fees against individual parties are DENIED; and

(9) Costs of this litigation are assessed to Defendant McAllister Towing and Transportation Company, Inc.
IN RE NORTH EUROPEAN OIL CORP.

No. 753

Court of Chancery of the State of Delaware, New Castle

August 9, 1995

Petitioner brought action seeking to compel corporation to issue replacement stock certificates, pay accrued dividends, and declare an accounting. Petitioner claimed to own by devolution 7,246 shares of the corporation’s successor in interest which were lost or destroyed.

The court of chancery, per Vice-Chancellor Jacobs, held that petitioner failed to establish to a reasonable certainty beneficial ownership of the claimed shares. Therefore, the petition for relief was denied.

1. Corporations ☞ 109

Section 168 is the applicable law for determining whether petitioner is entitled to receive replacement stock certificates which allegedly devolved to petitioner but were lost or destroyed. DEL. CODE ANN. tit. 8, § 168 (1995).

2. Corporations ☞ 109

Under the case law interpreting section 168, a petitioner who seeks a judicial order compelling a corporation to issue replacement stock certificates has the burden of establishing to a reasonable certainty that: (1) the petitioner beneficially owns the shares claimed, and (2) the original certificates were lost, stolen, or destroyed.

3. Corporations ☞ 109

A petitioner who claims ownership of lost, stolen, or destroyed stock certificates by virtue of status as an heir must, as a threshold matter, establish to a reasonable certainty that the decedent beneficially owned the claimed shares at death.
4. Corporations  \[=\] 109

Unsubstantiated and speculative factual inferences do not satisfy the reasonable certainty test under section 168.

5. Corporations  \[=\] 109, 139

Ownership of property shown to have existed in a particular person is presumed to continue to exist until such time as it appears from the evidence that such person was divested of it by his own act or by operation of law. The weight of such presumption is affected by such factors as the length of time that has elapsed and the character of the property as salable. 29 AM. JUR. Evidence § 293 (1995).

6. Corporations  \[=\] 109, 139

Uncontroverted evidence that: (1) partnership was in the business of acquiring stock in new companies, developing those companies, and promoting and selling stock; and (2) all certificates for the claimed shares were indorsed in blank and delivered to the partnership supports the inference that the partnership did not intend to hold the shares for the long term.

7. Corporations  \[=\] 109, 128

The nature of the partnership’s promotional business endeavors and short-term investment strategy defeat any presumption of continued ownership. It is more likely that any shares beneficially owned by the partnership were transferred to third party purchasers.

Louis J. Finger, Esquire, and Thomas A. Beck, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for petitioner.

William O. LaMotte, III, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for respondent.

JACOBS, Vice-Chancellor

The petitioner, Mildren P. Bauman ("petitioner"), claims to own by devolution 7,246 shares of North European Oil Corporation ("NEOC"), the certificates for which were lost or destroyed. She claims that NEOC’s successor in interest, North European Oil Royalty Trust
Petitioner therefore asks this Court, pursuant to 8 Del. C. § 168, (i) to compel NEORT to issue replacement units of NEORT into which the NEOC shares are exchangeable; (ii) to declare that she is entitled to all rights, including any accrued dividends, attendant to the NEORT units and their predecessor securities; and (iii) to order the NEORT trustees to account for the NEOC shares to which she is beneficially entitled and that (she claims) were improperly exchanged by record owner-nominees.

The parties have submitted the matter for final decision based upon a stipulated trial record. This is the Opinion of the Court on the merits of the petition.

I. FACTS

A.

The petitioner is the daughter of the late Doris E. Burns and the executrix under her mother’s will. Doris Burns was the widow and sole heir of Todd M. Pettigrew ("Pettigrew"), who died on December 13, 1951. Pettigrew and his former partner, Joseph Meyer Jr. ("Meyer"), who died in 1954, were involved in the oil and gas exploration business in the United States and Germany.

In 1919, Messrs. Pettigrew and Meyer formed a partnership, which they incorporated in 1925 as Pettigrew & Meyer, Inc., a New York corporation ("P&M I"). P&M I operated until it was dissolved in late 1930. At the time of its dissolution, Messrs. Pettigrew and Meyer held all of P&M I’s outstanding voting shares. (Berry-Shutt Dep. Exs., at 15). After P&M I was dissolved, Pettigrew and Meyer continued to work together, and on March 17, 1933, they formed a second New York corporation that was also named Pettigrew & Meyer, Inc. ("P&M II"). Five months later, in August 1933, the two men amicably terminated their business relationship. As later discussed, P&M II went out of business in 1942.

Because a critical disputed issue is whether P&M I was a beneficial owner of NEOC stock, it is necessary to discuss the formation and

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This part of the Opinion recounts the general factual background. Other facts are set forth, where relevant, in Part III, infra. Many of the facts are undisputed, but where there are disputes the facts are as found herein.
business of NEOC, as well as how its shares came to be held and distributed.

Throughout their fourteen year relationship, Messrs. Pettigrew and Meyer were engaged in the business of seeking out and developing new oil companies. Typically they would acquire stock in a company, and then develop that company and promote the sale of its shares. NEOC was one of those enterprises.²

NEOC was incorporated in Delaware on February 20, 1929, to conduct the business of developing oil concessions in northwestern Germany. NEOC’s primary assets were the capital stock of four subsidiary corporations that owned oil concessions on 1,400,000 acres in the state of Oldenburg in northwestern Germany (the "German subsidiaries"). As of September 26, 1934, NEOC had 4,000,000 authorized shares of common stock of which 1,392,291 shares were issued. (PX C, N0030-31). Another 300,000 shares were issued as part of the settlement of a lawsuit against NEOC, thereby increasing NEOC’s issued and outstanding shares to 1,692,291. (Id.). From that point forward, no other NEOC shares were ever issued.

No NEOC stock was ever registered in the names of Pettigrew, Meyer, P&M I, or P&M II. It is undisputed, however, that Messrs. Pettigrew and Meyer owned beneficially, through nominees, enough NEOC shares to enable them, together with their supporters, to control NEOC’s board of directors during that company’s early years.

It also is undisputed that large blocks of NEOC shares were originally issued to, and registered in the names of, several other persons and entities. (See generally, PX I). Among the persons were to whom those NEOC shares were originally issued were E.G. Clarke ("Clarke"), E.M. Canfield ("Canfield"), E.G. May ("May"), and G.C. Swisher ("Swisher"). The records of NEOC’s transfer agent show that each of these persons was an original registered owner of at least the following NEOC shares:

<table>
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<tr>
<th></th>
<th>Shares</th>
</tr>
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<tbody>
<tr>
<td>Clarke</td>
<td>224,000</td>
</tr>
<tr>
<td>Swisher</td>
<td>86,800</td>
</tr>
<tr>
<td>May</td>
<td>30,000</td>
</tr>
<tr>
<td>Canfield</td>
<td>40,000</td>
</tr>
</tbody>
</table>

²NEOC was originally named Nord Oil Company, but its name was changed to North European Oil Corporation on August 12, 1929.
Those records also disclose that Swisher, May, and Canfield became the registered owners of additional NEOC shares through secondary transfers (as distinguished from an original issue) of those shares. (Id.).

A critical question in this case is whether those four individuals held those shares as beneficial owners in their own right, or merely as nominees for the benefit of P&M I. According to Donald S. Dawson ("Dawson"), a long-time employee of P&M I and of other Pettigrew and Meyer-controlled companies, May, Swisher, and Canfield were all lower-level employees of P&M I. May was a switchboard operator, Canfield was Pettigrew’s personal secretary, and Swisher was Meyer’s personal secretary. (Dawson Dep. at 12-15). Clarke, on the other hand, was not an employee of NEOC. About Clarke the record reveals little, except that in 1957 he was connected in some way to Consolidated Edison Company, the New York City utility. (Berry-Shutt Dep. Exs., at 15).

The NEOC transfer agent’s records show that after the initial issuance of NEOC shares in early 1929 and continuing into 1931, Clarke, Swisher, May, and Canfield frequently transferred to third parties blocks of the NEOC shares that were initially registered in their names. After 1931, those transfers slowed considerably until they stopped altogether in the mid-1930s. (See, e.g., PX I, at sheets 19, 22, 24, 25, 27, 28, 30, 31, 32, 34, 70 (Clarke transfers); id. at sheets 7, 11, 29-31, 43-45, 51-53, 92A-103, 115-118 (Swisher, May, and Canfield transfers); and PX J).

Not all of the shares originally registered in the names of May, Canfield, Swisher, and Clarke were transferred to third parties, however. As NEOC’s records disclose, before the company was revived in the mid-1950s, 6,100 NEOC shares remained registered in Clarke’s name, 900 of which were transferred between 1955 and 1965. That left 5,200 shares registered in the name of Mr. Clarke. (PX J). It also appears to be undisputed that (i) 1,346 NEOC shares remain registered in the name of Swisher, and that (ii) 400 NEOC shares that were registered in the name of Canfield, and 300 NEOC shares that were registered in the name of May, remained so registered until May and Canfield died, after which replacement certificates were issued to their respective executors. It is those 7,246 shares -- 5,200 originally registered in Clarke’s name, 1,346 still registered in Swisher’s name, 400 previously registered in Canfield’s name, and 300 previously registered in May’s name -- that are the subject of the petitioner’s claim (the "claimed shares").

B.

By 1933 Messrs. Pettigrew and Meyer had lost voting control of NEOC, and NEOC’s business difficulties led to their subsequent ouster
from the management of that company. (PX C, at N0216). After their departure, NEOC’s problems persisted. In May 1934, faced with the prospect of losing its oil concession assets in Germany because of insufficient capital, NEOC transferred those assets to Socony Vacuum Oil Company ("Socony"). In exchange, Socony agreed to develop those assets and to pay royalties to NEOC.

At the outbreak of World War II, the German government expropriated all of NEOC’s assets in Germany. As a consequence, NEOC ceased paying its Delaware franchise taxes, the company’s corporate charter was voided, and NEOC went out of business.

After World War II ended, commercial quantities of oil and gas were discovered on some of the (formerly expropriated) concession properties still owned by NEOC’s German subsidiaries. Beginning in 1948, those subsidiaries began receiving royalties under NEOC’s agreement with Socony. Because NEOC now had economic value, in June 1954, certain NEOC stockholders led by John H. Van Kirk ("Van Kirk") arranged to revive NEOC’s corporate charter. However, even after its revival the corporation was incapable of acting, because holders of shares sufficient to constitute a majority of NEOC’s outstanding voting stock could not be located.

To overcome that paralysis, the corporation successfully petitioned this Court to approve a plan of reorganization in 1957. In re North European Oil Corp., Del. Ch., 129 A.2d 259 (1957). Under that reorganization plan, a new Delaware corporation, the North European Oil Company ("NEOC II"), was created. NEOC II acquired all of NEOC’s assets and liabilities, and in exchange, NEOC shareholders became entitled to redeem their shares of NEOC for shares of NEOC II on a one-for-one basis. All NEOC shares that were not redeemed after four months were returned to NEOC II, which held them in trust for NEOC stockholders who might claim them in the future. This reorganization plan made it possible to constitute a new, smaller, group of shareholders that were known and located and that, therefore, were capable of garnering the majority vote required to authorize corporate action.

NEOC II continued to operate until it was dissolved in the mid-1970s. Under its plan of dissolution, the assets and liabilities of NEOC II were transferred to a newly formed entity, North European Oil Royalty Trust ("NEORT"), and NEOC II’s stockholders received two units of NEORT for each of their NEOC II shares. Because some of the original NEOC stockholders were still unknown and/or unlocated and had not come forward to exchange their NEOC shares for shares of NEOC II, the Court directed the trustees of NEORT to hold in trust the NEOC shares registered to unlocated or unknown NEOC stockholders who might claim

The record shows that certificates representing at least 13,046 shares of NEOC have never been presented to the NEORT trustees. Of that number, replacement certificates for approximately 5,900 of those shares were, nonetheless, issued when the registered owners, or their heirs, made claims to those shares. Those claimants included Clarke and the heirs of May and Canfield. The balance of those shares remained unclaimed, and have not been exchanged for shares of NEOC II or for units of NEORT.

II. THE CONTENTIONS

The petitioner’s argument in support of her claim of ownership has five steps. The first step is that all of the 7,246 claimed shares were at one time registered in the names of Clarke (5,200), Swisher (1,346), May (300), and Canfield (400), who held as nominees for the benefit of P&M I. P&M I’s beneficial ownership of those shares, petitioner says, is established by NEOC documents, the records of NEOC’s transfer agent, and other evidence of record.

The remaining four steps of Petitioner’s argument proceed as follows: (1) P&M I’s initial beneficial ownership of the claimed shares having been established, absent a showing to the contrary a legal presumption arises that that beneficial ownership continued. (2) Because there is no evidence that P&M I was ever divested of ownership of the claimed 7,246 NEOC shares, it must be presumed that upon P&M I’s dissolution, those ownership interests passed to Messrs. Pettigrew and Meyer. (3) Because there is no evidence that Messrs. Pettigrew and Meyer ever divested themselves of their ownership interests in those 7,246 shares, it must be presumed that those ownership interests became assets of Pettigrew’s and Meyer’s respective estates when they died. (4)

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3In 1973 Clarke was contacted by Morton Grossman ("Grossman"), who was in the business of locating the owners of abandoned assets. (Grossman Dep. at 2-3). In late 1974, Grossman submitted an Affidavit of Loss and Indemnity Agreement on Clarke’s behalf claiming that Clarke legally and beneficially owned the 5,200 shares of NEOC still registered in his name. The Affidavit represented that "many years have passed since the above securities were issued, and therefore, the details concerning the receipt or disposition of the certificates cannot be recalled." (Tatler Exs., at 7). Clarke received 5,463 shares of NEOC II, 2,700 of which were later transferred to third parties in 1975 (PX I, at sheets 4497, 4902, 4525, 4530, 4574). The balance were exchanged for units of NEORT. (PX I, at sheet 229).
Therefore, the ownership of those shares devolved to Pettigrew’s and Meyer’s respective heirs, including the petitioner.⁴

Petitioner concludes that she has established her ownership of the claimed shares, and is therefore entitled to replacement certificates therefor. She also contends that because the NEORT trustees improperly exchanged units in the trust for certain of the NEOC shares to which she claims ownership, the respondents must be ordered to account to her for those shares as well.

The respondents contend that the petitioner’s requested relief must be denied, because she has failed to meet her burden of establishing to a "reasonable certainty" that she owns the shares in dispute. The respondents first argue that the evidence is insufficient to support petitioner’s claim that Canfield, May, Swisher and Clarke held the disputed shares as nominees for the benefit of P&M I. Second, the respondents contend that even if at one time P&M I did beneficially own the 7,246 shares, the petitioner has failed to prove: (a) that P&M I owned those shares at the time it was dissolved; (b) that Pettigrew received any shares of NEOC when P&M I was dissolved and liquidated; (c) that any of the claimed shares ever became assets of P&M II; (d) that if the claimed shares did become assets of P&M II, they were distributed to Pettigrew when P&M II was dissolved; and (e) that Pettigrew beneficially owned any of the claimed shares at his death. These failures of proof, the respondents argue, compel the conclusion that petitioner has not met her evidentiary burden and must therefore be denied the relief that she seeks.

III. THE LEGAL STANDARD AND ITS APPLICATION TO THE EVIDENCE

[1] The applicable law is not disputed. 8 Del. C. § 168 pertinently provides:

(a) If a corporation refuses to issue new shares or a new certificate of stock in place of a certificate . . . alleged to have been lost, stolen or destroyed, the owner . . .

⁴Petitioner claims that there is an enforceable agreement between the respective heirs of Messrs. Pettigrew and Meyer, which provides for an even division of any NEOC assets that belonged to either Pettigrew or Meyer. For that reason, petitioner argues, she is not required to show the proportions in which the claimed NEOC shares belonged to one group of heirs or the other, and that as the devolutionary beneficiary of Todd Pettigrew, she is entitled to half of the shares of NEOC in dispute (3,623 shares), the certificates for which (she claims) were lost or destroyed.
may apply to the Court of Chancery for an order requiring
the corporation to show cause why it should not issue new
uncertificated shares or a new certificate of stock in place of
the certificate so lost, stolen or destroyed. . . .

(b) If upon hearing, the court is satisfied that the
plaintiff is the lawful owner of the number of shares of
capital stock . . . described . . . it shall make an order
requiring the corporation to issue and deliver to the plaintiff
new uncertificated shares or a new certificate for such
shares. . . .

[2-3] Under the case law interpreting § 168, a petitioner who seeks a
judicial order compelling the corporation to issue replacement stock
certificates has the burden of establishing to a "reasonable certainty" that
the petitioner beneficially owns the shares claimed and that the original
certificates for those shares were lost, stolen, or destroyed. See Merrill
Lynch v. North European Oil Royalty Trust, Del. Supr., 490 A.2d 558,
563 (1985); Castro v. ITT Corp., Del. Ch., 598 A.2d 674, 677-78 (1991);
Because the petitioner here claims ownership by virtue of her status as
Pettigrew's heir, she must, as a threshold matter, establish to a
"reasonable certainty" that Pettigrew beneficially owned the claimed
shares at the time of his death.

To satisfy that burden, petitioner's own theory requires that she
prove: (1) that the claimed shares were held by Clarke, Swisher, May,
and Canfield, as nominees for the benefit of P&M I; (2) that beneficial
ownership of the claimed shares continued to reside in P&M I until its
dissolution; (3) that upon the dissolution of P&M I, the beneficial
ownership of the claimed shares passed to Messrs. Pettigrew and Meyer;
and (4) that at the time of Pettigrew's death the claimed shares became
a part of his estate.

[4] For the reasons discussed below, I conclude that the petitioner has
not satisfied that burden. All that the petitioner has shown is that
initially, Clarke, Swisher, May, and Canfield probably held some NEOC
shares for the benefit of P&M I. But petitioner has not established any
of the remaining elements of her case. As discussed below, the
petitioner's case rests largely upon increasingly unsubstantiated and
speculative factual inferences, and ultimately, upon a misplaced legal
presumption. As a result, I simply am unable to conclude that petitioner
has proven to a "reasonable certainty" that she beneficially owns any
portion of the 7,246 claimed shares.
UNREPORTED CASES

A. Whether the Shares Claimed by Petitioner Were Held by Clarke, Swisher, May, and Canfield as Nominees for the Benefit of P&M I

The petitioner begins with the argument that because P&M I controlled the board of NEOC during its early years, it must therefore have owned significant stock in NEOC. She reasons that because there is no evidence that any NEOC shares were ever registered in the names of either P&M I, Pettigrew, or Meyer, it follows that P&M I beneficially owned the shares and caused them to be held by others acting as P&M I's nominees, specifically, Clarke, Swisher, May, and Canfield. I now turn to the evidence relating to that contention.

1. The Shares Registered in the Name of Clarke

According to the records of NEOC's transfer agent, 224,000 NEOC shares were originally issued in the name of Clarke on March 6, 1929. To support her claim that Clarke held those shares as P&M I's nominee, the petitioner relies upon three letters written by J. Keating, Esquire ("Keating"). Mrs. Pettigrew retained Keating in 1957 to investigate whether her late husband's estate could claim ownership of any NEOC shares held in the names of other persons. Keating's compensation was made contingent upon his recovery of NEOC shares. (Berry-Shutt Dep. Exs., at 14-16).

Keating wrote the three letters in August 1957, as part of his effort (which proved unsuccessful) to secure NEOC shares for Mrs. Pettigrew. Keating's first letter, dated August 7, 1957, was to Karl Hasselmann ("Hasselmann"), an attorney and former NEOC director, to whom Keating stated that, "one of the impediments against my obtaining this stock is that Clarke has said that he held as a nominee for Pettigrew and Meyer, Inc." (Id. at 16).

Keating's second letter, dated August 14, 1957, was to Clarke himself. Keating attempted to persuade Clarke that upon the dissolution of P&M I, its assets would be split evenly and solely between Messrs. Pettigrew and Meyer. Keating assured Clarke, in that connection, that there was no reason for concern about the claims of creditors, because he was "sure that in 1930 Pettigrew & Meyer, Inc. was a perfectly solvent corporation." (Id. at 15).

Respondents do not dispute that P&M I was at least initially the beneficial owner of a significant number of NEOC shares.
Keating's third letter, dated August 21, 1957, was to Hasselmann. Keating wrote:

Earl Clarke telephoned me yesterday. The dissolution certificate [for P&M I] had pretty well convinced him that any stock in his name was held for the benefit of the heirs respectively of Joe Meyer and Todd Pettigrew.

I told him I had in mind working out some plan to have the stock of the new corporation [NEOC II] issued and to hold it in trust for a period of, say, five years, with him, Mrs. Pettigrew and Marjory and her mother each to have one-third. I told him of my contingent fee arrangement under which I would be entitled to one-fourth of the stock in trust . . ..

(Id. at 14). Petitioner contends that these letters, taken together, are persuasive evidence that Clarke held the NEOC shares registered in his name as nominee for the benefit of P&M I. I find, however, that even if Clarke did hold some shares for the benefit of P&M I, the record does not clearly establish that he held in that capacity all the shares that were registered in his name.

First, there is evidence that Clarke held some NEOC shares for the benefit of persons other than P&M I. In 1954, when Van Kirk was attempting to revive NEOC, he contacted Clarke in an effort to obtain his proxy. Clarke reportedly told Van Kirk that he (Clarke) was holding the shares for the benefit of someone else (he did not say whom) and did not think he should grant a proxy. (Van Kirk Dep. at 51-53). During the mid and late 1950s, several hundred shares registered in Clarke's name were submitted for transfer by third persons having no apparent connection to Pettigrew, Meyer or their companies. (PX J, Clarke Acct.). From this evidence it can plausibly be inferred that Clarke was holding 5,200 of the shares claimed by petitioner as a nominee for someone other than P&M I.

Second, there is evidence that Clarke held both the record and the beneficial title to some shares of NEOC. Clarke, unlike Swisher, May and Canfield, was not an NEOC employee. Yet the petitioner does not offer, nor does the record disclose, any explanation of why P&M I would cause such a large block of shares (224,000 shares, far more than the number registered in the names of Swisher, May, and Canfield) to be held by someone who was neither a P&M I employee nor a broker. Moreover, when Clarke exchanged his NEOC shares for shares of
NEOC II in 1974, he was required to — and did — represent that he owned those shares. (See FN 3, p. 7, and Tatler Dep. Exs., at 7). Those facts suggest that Clarke was an investor in NEOC who owned outright some or all of the NEOC shares registered in his name.

Thus, the record contains credible evidence that Clarke held shares of NEOC for the benefit of persons (including himself) other than P&M I. That evidence supports competing and opposite inferences as to who beneficially owned the 5,200 claimed shares that were previously registered in Clarke’s name. The evidence does not clearly show that all the shares registered in Clarke’s name were beneficially owned by P&M I, or by Pettigrew or Meyer; and even if Clarke held some NEOC shares for the benefit of P&M I, petitioner has not shown that included among them were the 5,200 shares that she now claims. Given the inconclusiveness of the evidence, I am unable to find that the petitioner has met her burden of establishing to a "reasonable certainty" that 5,200 of the 7,246 claimed shares were held by Clarke for the benefit of P&M I.

That leaves for determination the balance of the petitioner’s claim, namely, the 2,046 shares that were registered in the names of Swisher, May, and Canfield. I turn to the evidence relating to those shares.

2. The Shares Registered in the Names of Swisher, May, and Canfield

Relying upon the records of NEOC and NEOC’s transfer agent, the petitioner asserts that P&M I beneficially owned the 1,346 claimed shares registered in the name of Swisher, and the 700 claimed shares previously registered in the names of May and Canfield. Petitioner first contends that information contained in an NEOC document dated January 11, 1930 (referred to as the "January 1930 stock analysis"), and in the records of NEOC’s transfer agent, establish that (a) Swisher, May, and Canfield held for the benefit of P&M I certain large blocks of NEOC shares originally registered in their names in April, June and July 1929; and that (b) other blocks of shares originally issued to "escrow" or to one Frederick Pope ("Pope") were transferred in secondary (i.e., non-original issue) transactions to Swisher, May, and Canfield, who held those shares as nominees for the benefit of P&M I. The petitioner then uses the certificate numbers representing the 2,046 claimed shares in an effort to trace their source, that is, to show that those claimed shares came either from the blocks of shares originally issued to Swisher, May, and Canfield in April, June, and July of 1929, or from the shares subsequently
registered in their names after the secondary transfers from escrow and from Pope.

With one minor exception, the evidence does not support the petitioner's position.

a.

The January 1930 stock analysis contains a breakdown of persons or entities that held legal title to NEOC's outstanding capital stock at that point in time. That stock analysis shows that a 25,000 share block and a 15,000 share block were issued on April 4, 1929, and that a third, 10,000 share, block was issued on June 1, 1929. All these shares were listed as owned by P&M I in "street names." (PX C., at N0270). Correspondingly, the records of NEOC's transfer agent show that stock certificates representing the same aggregate number of NEOC shares were issued in the names of Swisher, May, and Canfield on dates falling within the same time frame as the issue dates shown in the January 1930 stock analysis.6

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6A transfer sheet dated April 4, 1929, shows that 25,000 shares were authorized for issuance to persons whose names do not appear on the January 1930 capital stock analysis. The number of shares being issued, and the persons involved, were:

- April 4, 1929:
  - E.G. May: 5,000 shares
  - E.M. Canfield: 5,000 shares
  - J.H. French: 5,000 shares
  - J.B. Franklin: 5,000 shares
  - G.C. Swisher: 5,000 shares
  - Total: 25,000 shares

(PX I, at sheet 3). A transfer sheet dated April 11, 1929, shows that additional shares were authorized for issuance as follows:

- April 11, 1929:
  - E.G. May: 5,000 shares
  - E.M. Canfield: 5,000 shares
  - G.C. Swisher: 5,000 shares
  - Total: 15,000 shares

(Id. at sheet 4). Finally, a transfer sheet dated June 8, 1929, shows that the following additional shares were authorized for issuance:

- June 8, 1929:
  - E.G. May: 5,000 shares
  - E.M. Canfield: 5,000 shares
  - Total: 10,000 shares

(Id. at sheet 15). Thus, the 50,000 shares authorized for issuance to May, Canfield, Franklin, French, and Swisher in April, May and June 1929 corresponds precisely to the 50,000 shares that the January 1930 stock analysis shows were held in street names for P&M I; and the dates upon which the blocks of stock were issued also correspond to the issue dates shown in the January 1930 stock analysis. (Id. at sheets 3, 4, and 15).
Similarly, the January 1930 stock analysis shows that blocks of NEOC shares were issued to "Escrow (street names)" on June 5, 1929 and July 26, 1929; and the corresponding transfer agent records show the same number of shares being registered in the names of Swisher, May, and Canfield. The transfer agent's records also show that almost immediately after the initial issuance of NEOC shares to Swisher, May, and Canfield in early 1929, and continuing into 1931, those persons frequently transferred to third parties smaller blocks of the NEOC shares that had originally been registered in their names. (See, e.g., PX I, at sheets 7, 11, 29-31, 43-45, 51-53, 92A-103, 115-118). This evidence supports the petitioner's contention that those three persons held NEOC shares as nominees for the benefit of P&M I.

Petitioner next shows that some NEOC shares not originally issued to Swisher, May, and Canfield came to be registered in their names through secondary transactions. According to the transfer agent's records, on three occasions in March and April 1929, Frederick Pope transferred NEOC shares to either Swisher, May, or Canfield. (PX I, at sheets 83, 92, and 125). Although petitioner asserts in her brief that Pope sold those shares to P&M I, that assertion is not supported by any citation to the record. (P O.Br., at 8). Finally, during 1930 and 1931, Swisher, May, and Canfield became the registered owners, through five secondary transactions, of some NEOC shares that were originally issued in escrow to the law firm of Bauer, Pogue, Pond, & Vivian. (PX I, at sheets 324A, 604, 610, 611, 628, and 645). However, in those same transactions, that law firm also transferred NEOC shares to various other persons and entities. (Id.).

Before proceeding to the next step in petitioner's argument it is helpful to pause and summarize what has been established thus far. The petitioner has adduced persuasive evidence to support her contention that Swisher, May, and Canfield were used as nominees by P&M I to hold for its benefit the blocks of shares that were originally issued in their names.

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7The January 1930 stock analysis shows that 50,000 shares were authorized for issuance on June 5, 1929 to "Escrow (street names)." (PX C., at N0270). Correspondingly, a transfer sheet dated June 5, 1929, shows an additional 20,000 shares authorized for issuance to Swisher, 20,000 shares to Canfield, and 10,000 shares to May. (PX I, at sheet 12).

Similarly, the January 1930 stock analysis shows 3,400 shares issued on July 26, 1929, again to "Escrow (street names)." (PX C., at N0270), and the transfer agent's records show authorization to issue 50,000 additional shares to Swisher on that same date, (PX I, at sheet 26), and the return to capital stock of 46,600 shares (15,000 by F.E. Aspinwall; and 31,600 by Swisher) on November 14, 1929. (Id. at sheet 63). If the returned 46,600 shares are subtracted from the 50,000 shares issued on July 26, the 3,400 share difference dovetails precisely with the July 26, 1929 entry for issuance to "Escrow (street names)."
in April, June, and July 1929. The petitioner has also shown that those three persons became (as transferees) the registered owners of additional NEOC shares that had been originally issued to Pope and to Escrow. However, the petitioner has adduced no evidence establishing that Swisher, May, and Canfield held those additional shares specifically for the benefit of P&M I.

b.

Petitioner next attempts to show that the 2,046 shares she presently claims were part of the larger block of shares that Swisher, May, and Canfield held at one time for the benefit of P&M I. She does this by tracing the certificates representing the claimed shares presently registered in the name of Swisher, and the certificates representing the shares that were previously registered in the names of May and Canfield, back to the original certificates representing those (and other) initially held shares. In this manner the petitioner has demonstrated that 146 of the claimed shares registered in the name of Swisher came from the block of shares originally issued to Swisher in April, June, and July 1929. Petitioner also has shown that the remaining 1,900 of the claimed shares, 1,200 of which were registered in the name of Swisher, 300 of which were previously registered in the name of May, and 400 of which were previously registered in the name of Canfield, are traceable to the shares that were originally issued to Escrow or Pope, and later transferred to those three persons. (See P O.Br., at 25-27 and the record evidence cited therein).

I assume, without deciding, that petitioner has shown that all of the 2,046 claimed shares that came to be registered in the names of Swisher, May, and Canfield were held by those persons as nominees for someone. Even so, she has not proved that Swisher, May, and Canfield held more than 146 of those shares as nominees for the benefit of P&M I. Petitioner’s most forceful showing is that (i) blocks of shares were originally issued to P&M I in street names or to escrow in April, June, and July 1929, and that (ii) NEOC’s transfer agent’s records show dovetailing issuances of the same aggregate number of shares to Swisher, May, and Canfield. However, only 146 of the 2,046 shares that are presently claimed can be traced to those blocks of shares originally issued to Swisher, May, and Canfield. (Id.). The remaining 1,900 claimed shares were ultimately registered in those persons’ names as a result of secondary transactions in which there is no record evidence of P&M I’s involvement.

Thus, the petitioner has adduced no specific evidence that the remaining 1,900 claimed shares were beneficially owned by P&M I.
Petitioner's case appears to rest on the implicit argument that because 2,046 of the claimed shares were registered in the names of Swisher, May, and Canfield, and because those persons held some of those shares for the benefit of P&M I, the Court must infer that they held all of those shares in that capacity. That inference, while not altogether implausible, is highly speculative, and in no event does it rise to the standard of "reasonable certainty" required for this Court to conclude that P&M I beneficially owned the claimed shares.

* * *

In summary, on the question of whether Clarke, Swisher, May, and Canfield held the 7,246 claimed shares registered in their names for the benefit of P&M I, the evidence, viewed as a whole, is inconclusive as to all but 146 of the claimed shares. Because those four persons may also have held NEOC shares for the benefit of other persons, it cannot be determined with any certainty (let alone with of "reasonable" certainty) that the other 7,100 claimed shares were beneficially owned by P&M I.

B. Whether There Was Continuing Ownership

Even if it is assumed, arguendo, that the petitioner did prove to a "reasonable certainty" that all of the 7,246 claimed shares were originally held for the benefit of P&M I, that showing will not carry the day because it establishes only the first of several links in a chain of ownership succession. By her own theory of the case, the petitioner must also establish that (i) P&M I owned the claimed shares upon its dissolution, (ii) the shares were then distributed to Messrs. Pettigrew and Meyer when P&M I was dissolved, and (iii) Pettigrew continued to own those shares at the time of his death. I conclude, for the reasons next discussed, that the petitioner has failed to make any of these essential showings.

Petitioner argues, as she must, that Messrs. Pettigrew and Meyer owned the claimed shares at the time of their deaths. She claims that the practice at the time was that when NEOC shares were issued in the name of a nominee, the nominee would immediately endorse the certificates in blank and deliver them to the beneficial owner of the shares, in this case, P&M I. As proof, the petitioner points to photocopies of NEOC share certificates, issued in the names of Swisher, May, and Canfield, that those persons endorsed in blank shortly after the original date of issue. (See, e.g., Tatler Dep. Exs., at 1, certificate no. 23166; PX C, at N000311-12, and N000427).
The petitioner next argues that because certificates for some of the claimed shares were endorsed in blank almost immediately after being issued, it must be presumed, as a factual matter, that certificates for all of the shares in dispute were endorsed in blank and delivered to P&M I. Once P&M I received the certificates, so the argument goes, that company owned the underlying shares, and it is the respondents’ burden to show otherwise.

The final leg of petitioner’s argument is that having established that P&M I at one time owned the stock, she is entitled to a presumption that that ownership continued, absent evidence that P&M I was later divested of the shares either by a voluntary transfer or by operation of law. Petitioner concludes that because there is no such evidence, the Court must find that Pettigrew and Meyer owned the shares at the time of their deaths, and that the petitioner inherited the shares owned by Pettigrew.

Petitioner’s effort to show continuing ownership of the claimed NEOC shares rests upon a link between a factual assumption and a legal presumption. That effort fails for two reasons.

First, it cannot be assumed as a factual matter that all of the NEOC shares issued to Clarke, Swisher, May, and Canfield were immediately endorsed in blank and delivered to P&M I. That fact (if it is a fact) must be proven, and there is no evidence that that ever occurred. See Part IV A, supra. At most the petitioner has shown that P&M I was probably the beneficial owner of some of the shares registered in the names of Clarke, Swisher, May and Canfield. That those persons may have held some of those shares as nominees for the benefit of P&M I does not establish that they held all the shares registered in their names in that capacity. Yet that is the conclusion that petitioner would have the Court draw.

[5] Second, the petitioner’s reliance on the legal presumption of continued ownership is misplaced. Petitioner quotes from, 29 Am Jur, Evidence § 293, which states that "ownership of property shown to have existed in a particular person, is presumed to continue to exist until such time as it appears from the evidence that such person was divested of it by his own act or by operation of law." However, the very next sentence, which petitioner does not quote, states that, "[t]he weight of such a presumption is affected by such factors as the length of time that has elapsed, [and] the character of the property as salable." (Id.).

[6] Here, the uncontroverted evidence is that Messrs. Pettigrew and Meyer were in the business of acquiring stock in new oil and gas companies, developing those companies, and then promoting and selling the stock. There is no evidence that those gentlemen ever intended to, or did, hold stock in those companies as long term investments. Indeed, one of petitioner’s critical factual premises -- that all certificates for the
claimed shares were endorsed in blank and delivered to P&M I -- reflects that those shares were intended to be easily sold and transferred. That supports the inference that Pettigrew and Meyer did not intend to hold the shares for the long term -- an inference that is strengthened by the high rate of secondary transfers of NEOC stock during the early 1930s. (See generally PX I).

[7] Thus, even if P&M I beneficially owned all of the shares registered in the names of Clarke, Swisher, May, and Canfield, and even if all the certificates for those shares were immediately endorsed by those nominees in blank and then delivered to P&M I, the other undisputed facts do not support -- indeed they defeat -- any presumption of P&M I's continued ownership. Given the nature of P&M I's promotional business endeavors and its owners' relatively short-term investment strategy, it is more likely that any shares that P&M I beneficially owned (and that were represented by certificates endorsed in blank) were transferred to third party purchasers. Cf. Merrill Lynch Pierce Fenner & Smith, 490 A.2d at 561 (holding that it is reasonable to assume that over time securities registered in street names have been delivered to others); and In Re Metropolitan Royalty Corp., Del. Super., 62 A.2d 857, 858-59 (1948) (finding it unlikely, in the absence of persuasive contrary evidence, that an underwriter that normally acquired shares for immediate resale would hold a particular block of shares for long term investment). That conclusion is buttressed by the absence of any evidence that any shares of NEOC came into Pettigrew's possession during his lifetime, and by the absence of any proof that upon Pettigrew's death any of the claimed shares were listed as assets of his estate.

* * *

Because the petitioner has failed to meet her burden of establishing to a "reasonable certainty" that she is the beneficial owner of the claimed shares, her petition for relief under 8 Del. C. § 168 is denied. IT IS SO ORDERED.
THOMAS & BETTS CORP. v. LEVITON MANUFACTURING CO.

No. 14,069

Court of Chancery of the State of Delaware, New Castle

December 19, 1995
Revised January 3, 1996

Plaintiff, a minority shareholder of a previously private, family-owned corporation, brought suit, pursuant to section 220, to inspect certain books and records of the defendant corporation. Plaintiff alleged it was entitled to inspect defendant’s stockholder list to communicate with other shareholders on matters concerning defendant’s underperformance. Second, plaintiff alleged it was entitled to inspect defendant’s books and records to value its investment, to account properly to its own shareholders for its investment in defendant corporation, and to investigate allegations of waste and mismanagement on the part of defendant’s directors and officers.

The court of chancery, per Vice-Chancellor Jacobs, concluded that plaintiff was entitled to inspect defendant’s list of Class A common stockholders, Class B common stockholders, and preferred stockholders. Additionally, the court concluded that plaintiff had failed to support its allegations of waste and mismanagement, and plaintiff had failed to meet its burden of establishing its claimed need to inspect defendant’s books and records in order to employ the equity method of accounting for its investment in defendant corporation. However, the court found that plaintiff had demonstrated a legitimate need to value its investment and to have information essential and sufficient for that purpose. The court thereafter granted a right to inspection of limited documents, including audited financial statements of defendant corporation for the last three fiscal years, audited financial statements of all direct and indirect defendant subsidiaries for the last three years, and all federal tax returns filed by defendant for the last three years.

1. Corporations \( \leftrightarrow 181(5) \)

To become entitled to inspect a corporation’s shareholder list, a shareholder must make a demand under oath that states a purpose reasonably related to its interest as a shareholder. Del. Code Ann. tit. 8, § 220(b) (1991 & Supp. 1994).
2. Corporations  ⇔ 181(1), 181(8)

A shareholder seeking to inspect a shareholder list is presumed to have a proper purpose, and the corporation has the burden to prove that the shareholder’s purpose is improper. Del. Code Ann. tit. 8, § 220(b), (e) (1991 & Supp. 1994).

3. Corporations  ⇔ 181(8)

Any doubts as to right of inspection will be resolved in favor of the statutory inspection right.

4. Corporations  ⇔ 181(2)

Where a stated purpose for inspection is so indefinite, doubtful, uncertain, or vexatious as to warrant denial of the right of inspection, the presumption in favor of inspection may be rebutted.

5. Corporations  ⇔ 181(2), 181(3)

Shareholder’s stated purpose for inspecting corporation’s shareholder list which included learning the identity of, and contacting, corporation’s shareholders to explore either acquiring their shares or selling the proposed inspector’s shares to them is proper.

6. Corporations  ⇔ 181(8)

Where the plaintiff has stated a proper purpose, the burden then rests upon the corporation to prove that the purpose is improper.

7. Corporations  ⇔ 181(8)

Any technical deficiency in plaintiff’s demand letter was cured when purpose was established with specificity in depositions, at trial, and in its post-trial memoranda.

8. Corporations  ⇔ 181(1)

Where the subject of the demanded inspection is the corporation’s books and records, the shareholder has the burden of establishing a proper purpose.
9. Corporations 181(1)

The stated purpose for inspection must not be adverse to the corporation’s interest.

10. Corporations 181(2)

The court will compel production of only those books and records that are essential and sufficient for the shareholder to effectuate his purpose.

11. Corporations 181(1), 181(8)

That the corporation may incur a risk due to the disclosure of the corporation’s non-public information in a section 220 action will not normally operate to bar the statutory inspection right.

12. Corporations 181(8)

Plaintiff’s offer to inspect corporation’s books and records, subject to a confidentiality agreement, is a reasonable way to address a corporation’s privacy concerns.

13. Corporations 181(1)


Where investigating waste and mismanagement is the purpose for inspection, the demanding shareholder has a greater-than-normal evidentiary burden, because the shareholder must adduce evidence from which a credible possibility of mismanagement and waste may be inferred.

15. Corporations 181(1), 181(5), 181(8)

Statements from prior shareholder, who had a significant financial interest in helping demanding shareholder reach his goal, were not significantly reliable to create a credible inference of waste and
mismanagement. Because demanding shareholder did not adduce any other evidence of possible mismanagement, insofar as its inspection purpose rested on that ground, the demand for inspection failed for lack of record support.


That a corporation's performance may fall below industry norm does not, in and of itself, evidence waste and mismanagement.

17. Corporations ⇐ 181(1), 181(8)

Demanding shareholder's equity accounting purpose for inspection is legally improper where the purpose is to further an individual purpose, and not one related to its status as a corporate shareholder.

18. Corporations ⇐ 181(1)

A section 220 action cannot serve as a vehicle to force a corporation to change its accounting practices or as a means to invade the corporate board room.

19. Corporations ⇐ 181(8)

The equity method of accounting will be denied to a stockholder who has not met his burden of establishing his need to inspect the corporation's books and records.

20. Corporations ⇐ 181(5)

Demanding shareholder's stated purpose for inspection — to facilitate long range planning — is wholly unspecific, and for that reason alone, is insufficient.

21. Corporations ⇐ 181(1)

If sole purpose for inspection is to pursue a hostile takeover, the purpose is improper.
22. Corporations $\Leftrightarrow$ 181(1)

Valuation of a stockholder’s investment in a corporation, particularly where the corporation is privately held, has long been recognized as a proper purpose under section 220. Del. Code Ann. tit. 8, § 220 (1991 & Supp. 1994).

23. Corporations $\Leftrightarrow$ 181(1)

Minority shareholders in a private corporation have a legitimate need to inspect the corporation’s books and records to value their investment, to decide whether to buy additional shares, sell their shares, or take some other action to protect their investment.

24. Corporations $\Leftrightarrow$ 181(1), 181(8)

Policy behind section 220 requires that minority shareholder, whose aspiration to gain control was frustrated, be permitted to seek information to which any similarly situated (but non-control-motivated) minority stockholder would be entitled, because of legitimate need to value its investment.

25. Corporations $\Leftrightarrow$ 181(8)

Corporation’s concern over minority shareholder’s control-acquiring motive for inspection is more properly addressed by adjusting the scope of relief than by denying relief altogether.

26. Corporations $\Leftrightarrow$ 181(1)

A stockholder’s statutory right to compel an inspection of corporate books and records is to be narrowly construed.

27. Corporations $\Leftrightarrow$ 181(8)

The stockholder has the burden to justify each category of books and records whose production he seeks to have compelled. Only those records that are essential and sufficient will be required.